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No. 75-1442

In the Supreme Court of the United States

OCTOBER TERM, 1975

JIMMY-RICHARD CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-17) is reported at 527 F.2d 803. The Board's decision and order (Pet. App. A-18 to A-46) are reported at 210 NLRB 802.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1975. A petition for rehearing was denied on January 15, 1976. The petition for a writ of certiorari was filed on April 9, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 2350(a), which contains a cross reference to 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly concluded that the employer's threats of plant closure and other unfair labor practices precluded a fair election and thus warranted issuance of a bargaining order based on the union's authorization card showing of support by a majority of the employees.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at Pet. 3.

STATEMENT

1. Petitioner Jimmy-Richard Co., Inc. (the "Company") manufacturers men's and boys' apparel in Hawkinsville, Georgia. On April 12, 1973, the Amalagamated Clothing Workers of America, AFL-CIO (the "Union") advised the Company that it represented a majority of its 94 production and maintenance employees. The Union requested a meeting with the Company for purposes of collective bargaining (Pet. App. A-36). On April 16, the Company notified the Union by letter that it refused to recognize or meet with the Union because it doubted that the Union represented a majority of the employees (*ibid.*). That same day, the Union filed an election petition with the Board, and the Board scheduled a representation election for June 1 (Pet. App. A-20 to A-21).

During the two weeks prior to the election, plant manager Durwood Dominy spoke to approximately 60 employees on various occasions (Pet. App. A-26; A. 188-189).[1]

[1] "A." refers to the transcript of the unfair labor practice hearing reproduced in Volume I of the appendix in the court of appeals. The portion of Volume I containing that material has been lodged with the Court.

In each instance Dominy told the employees that the plant would close down under certain conditions. On some occasions he told the employees that the plant would "close up and go back to St. Louis" if the Union won the election and demanded "too much money," and on others he stated that the Company would close the plant if the Company could not "meet" or "afford" the Union's demands (Pet. App. A-26 to A-29; A. 50-51, 57-58, 63, 67-68, 81-82, 84-85, 88-89, 94-95, 97, 102-103, 126, 130, 133-134, 152-153, 155-156).

Under the Company's existing vacation policy, the employees received a one-week paid vacation in the summer and two weeks at Christmas (Pet. App. A-32; A. 148, 179-180). Memorial Day has never been a paid holiday for Company employees (Pet. App. A-32; A. 185). Shortly before the election, supervisor Virginia Gillis approached approximately nine employees on separate occasions and told them she had " good news" for the employees. The "good news" was that they would have their two-week vacation in July rather than at Christmas, and that they would have Memorial Day as a paid holiday beginning in 1974, provided the Union lost the election (Pet. App. A-32 to A-35; A. 133, 146-147, 208-212). Employee Floyd was one of those to whom Gillis made these remarks. When Floyd discovered that this information had not been conveyed to certain other employees she asked Gillis why all the employees had not been told (Pet. App. A-32; A. 209). Gillis replied that she had been instructed to tell "just the ones that she thought wasn't for the Union" (*ibid.*).

The election was held at the beginning of June. The Union lost by a vote of 50 to 42 (Pet. App. A-21). Two weeks later the Company granted to all eligible employees a paid two-week vacation from June 29 through July 16 (Pet. App. A-42 to A-43; A. 180).

2. The Board, adopting the findings of the Administrative Law Judge, found that the Company had violated Section 8(a)(1) of the Act by threatening employees with plant closure if they selected the Union and by promising employees an additional paid holiday and a new vacation policy, provided the Union was not chosen (Pet. App. A-31, A-35, A-44). The Board also found that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the exclusive bargaining representative of the employees and by unilaterally changing terms and conditions of employment (Pet. App. A-42 to A-43, A-44). The Board ordered the Company, *inter alia*, to bargain with the Union upon request (Pet. App. A-45).

In concluding that a bargaining order was appropriate, the Board rejected the Company's contention that the Union's showing of majority support was tainted because it solicited cards on the misrepresentation that employees who signed would receive free insurance (Pet. App. A-37). The Board found, instead, that the Union was merely explaining benefits that could result if the plant were organized and a contract signed; it was "commonplace election propaganda long found by the Board and courts not to be objectionable" (*ibid.*). The Board also rejected the Company's assertion "that the employees who signed cards were misled because the back of the card 'indicates with definiteness' that the Union already has a collective bargaining contract with [the Company]" (Pet. App. A-38). The Board explained (*ibid.*): "On the reverse of the card is a checkoff authorization which authorizes dues deductions, in accord with existing law, 'for the period of one year until the termination of the collective-bargaining agreement between my Employer and the Union,

whichever occurs sooner . . . .' The Union has been trying to organize [the Company's] employees for 5 years or more, and it is more than difficult to believe tha[t] anyone would be misled by such language into believing that, somehow or other, contrary to both the Union's and the [Company's] preelection propaganda, a collective bargaining contract existed between the parties." The Board further found that the Union's demand for recognition was a continuing one and that, although the Union did not possess majority support on the date that if first requested recognition, it possessed 52 valid cards by May 8, 1973 (Pet. App. A-38 to A-41).[2]

Finally, the Board rejected the Company's argument "that no bargaining order should issue here because its election campaign was 'mild' and was not one that could prevent a fair election" (Pet. App. A-41 to A-42). The Board concluded that "the threats to close the plant in the instant case, with or without the promise of benefits, would have such an impact on employees that the 'possibility of erasing' its effects and 'of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order ...." (Pet. App. A-42, quoting from *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 614-615).

3. The court of appeals, with one judge dissenting in part, held that "the facts of this case [are] squarely within the parameters established in *Gissel*" (Pet. App. A-2). It therefore affirmed both the finding of unfair

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[2]Although the Administrative Law Judge stated that the Union had 48 valid cards (Pet. App. A-41), the court below correctly noted (Pet. App. A-6, n. 5) that this is a mathematical error; the discussion at Pet. App. A-38 to A-39 makes it clear that he validated 52 cards. In either case, the Union possessed majority support at the relevant time, for the unit consisted of 94 employees (Pet. App. A-36).

labor practices and the bargaining order. In upholding the bargaining order, the court stated (Pet. App. A-7):

> The employer's unfair labor practices—coercive threats, promises of benefits, and unilateral changes in employment conditions—occurred after the consent election was approved on May 9 and after the Union had obtained majority status. These practices reasonably account for the union's losing the election by a narrow vote of 50 to 42. [Citation omitted.] The company argues that the close vote indicates that its unfair labor practices were minor and not sufficient to entitle the union to a bargaining order. It seems more logical to conclude, however, that the union's slight majority could have been eroded, and was in fact destroyed, by the employer's threats of closing or moving the plant. Similarly, the promise of an additional holiday made to a small number of employees could have affected some of the six critical votes.

ARGUMENT

The question petitioner seeks to present (Pet. 2-3)—whether a bargaining order is appropriate where the employer made a threat of plant closure but there were "union misrepresentations in obtaining authorization cards" and the Union failed "to hold a majority of the employees at the time it demanded recognition" — is not properly before the Court. The Board found, and the court of appeals sustained the finding, that the Union did not make misrepresentations in soliciting cards

and that it did represent a majority of the employees at a time when its demand for recognition was in force.[3]

The only issue actually presented is whether the Board properly found that the Company's unfair labor practices were sufficiently serious to merit a bargaining order under the principles of *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575.[4] That issue involves only an application of settled principles to the facts of this case. It therefore does not warrant review by this Court.[5] In any event, *Gissel* made it clear that

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[3]Petitioner appears to contend (Pet. 12-16) that the court of appeals erred by not requiring the Board to explain its "substantial departure" from previous cases. But petitioner has not set this allegation out as a question presented for review. Nor did the Board depart "without explanation" from its own precedents. The propriety of a bargaining order depends upon a careful analysis of the facts of each case. The Board has fully explained its analysis of this case; it was not necessary to recite and "distinguish" all of its prior cases as well.

[4]*Gissel* indicated that a bargaining order is appropriate in both " 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices," and "cases marked by less pervasive practices which nonetheless still have a tendency to undermine majority strength and impede the election processes." 395 U.S. at 613, 615.

[5]*Dawson Metal Products* v. *National Labor Relations Board*, 450 F.2d 47 (C.A. 8), *Arbie Mineral Feed Co.* v. *National Labor Relations Board*, 438 F. 2d 940 (C.A. 8), *Peerless of America, Inc.* v. *National Labor Relations Board*, 484 F.2d 1108 (C.A. 7), and *National Labor Relations Board* v. *Gibson Products Co.*, 494 F. 2d 762 (C.A. 5), relied on by petitioner (Pet. 11-12), did not involve threats of plant closure. In *National Labor Relations Board* v. *General Stencils, Inc.*, 472 F.2d 170, 172 (C.A. 2), also relied on by petitioner (Pet. 12), the court agreed that threats of plant closure are particularly coercive, but found that the threat in that case did not warrant a bargaining order because it was made to only one employee who was about to quit and there was no evidence of wider dissemination. These cases reflect not a difference of principle but merely a difference of result upon applying the established principle to particular facts.

threats of plant closure similar to those the Board found here constituted "threats of reprisal [which] were so coercive that, even in the absence of a §8(a)(5) violation, a bargaining order would have been necessary to repair the unlawful effect of those threats." 395 U.S. at 615, 620.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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